APPENDIX A

Opinion of the Court of Appeals

Before: LUMBARD, *Chief Judge*, KAUFMAN and HAYS, *Circuit Judges*.

HAYS, *Circuit Judge*:

Appellants are the addressees of mail packages containing publications originating in North Vietnam and mainland China. When these packages reach the United States they are detained by the Commissioner of Customs pursuant to the Foreign Assets Control Regulations, 31 C. F. R. §500.808 (1968).[1] The Commissioner sends letters of notice to the addressees advising them of the detention and stating that the material will be released only if Foreign Assets Control issues a license.

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[1] 31 C. F. R. §500.808 Customs Procedures; merchandise specified in §500.204.

(a) With respect to merchandise specified in §500.204, whether or not such merchandise has been imported into the United States, directors of customs shall not accept or allow any:

(1) Entry for consumption (including any appraisement entry, any entry of goods imported in the mails, regardless of value, and any other informal entries);
. . . until either;

(i) A specific license pursuant to this chapter is presented, [or]

(ii) Instructions from the Foreign Assets Control, either directly or through the Federal Reserve Bank of New York, authorizing the transaction are received . . . .

Appellants did not apply for licenses for the packages addressed to them,[2] but brought this action, asserting that the Foreign Assets Control Regulations and the Trading with the Enemy Act §5(b), 50 U. S. C. App. §5(b) (1964), abridge their first amendment rights, that the statute unconstitutionally delegates legislative power to the President, that the President has unlawfully delegated powers to the Director of Foreign Assets Control, and that the statute and regulations deprive appellants of property without due process of law. They seek a declaratory judgment that the statute and regulations are unconstitutional, that no licenses need be obtained or applied for in transactions involving the importation of North Vietnamese or Chinese publications, and that payment for those publications may be made directly to the publishers rather than into blocked accounts. Appellants also ask for an injunction preventing the Commissioner from continuing to detain the publications already in his possession.

Plaintiffs moved for summary judgment or, alternatively, for a preliminary injunction and the convening of a statutory three-judge court. Defendants challenged the court's jurisdiction, and themselves sought summary judgment dismissing the complaint.

The district court held that it had jurisdiction under Section 1337 of the Judicial Code, 28 U. S. C. §1337 (1964), but granted summary judgment dismissing the complaint.

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[2] Plaintiff Charlotte Polin applied for the required licenses after the commencement of this action but before its dismissal by the district court. It took 8 weeks for the license to be issued and plaintiffs argued below that such a delay was an excessive burden to be placed on the exercise of first amendment rights. The court found, however, that the length of the delay was "apparently due to the pendency of this litigation as well as to [Polin's] own tardiness in supplying the required information," and that the normal delay should be only about 10 days. Miss Polin later applied for another license, which was processed within 10 days.

Appellant Teague thereupon applied for a license. Five weeks later he received a letter from the Federal Reserve Bank of New York requiring that he amplify his application by answering a series of questions. He has not done so. Instead, relying on the delay involved in processing Teague's application, plaintiffs moved pursuant to Fed. R. Civ. P. 60(b) to vacate the order of dismissal, arguing that the regulations involved a far more burdensome procedure than had previously been assumed to exist. The court denied the motion, finding that the length of the delay involved was attributable to the pending litigation, and that while some delay could always be expected it would be closer to 10 days than to 5 weeks.[3]

Plaintiffs have appealed from both judgments. We affirm.

I.

Section 5(b) of the Trading with the Enemy Act, 50 U. S. C. App. §5(b) (1964), authorizes the promulgation, during the time of war or other national emergency, of regulations controlling the flow of American currency to foreign nations.[4]

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[3] See note 2 *supra*.

[4] During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, . . . and
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> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or

In December 1950 President Truman proclaimed the existence of a national emergency. 64 Stat. A454 (1950). That proclamation has never been revoked. Although the proclamation took particular note of "recent events in Korea and elsewhere," it also made general reference to "the increasing menace of the forces of communist aggression."

As this court said in *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 109-10 (2d Cir.), cert. denied, 385 U. S. 898 (1966):

> "The declaration has never been revoked; rather it has been repeatedly and recently reaffirmed. . . . While the courts will not review a determination so peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe. Plaintiff's contention that the national emergency provision, which came into the statute at the time of the economic crisis of 1933, 48 Stat. 1, is limited to economic emergencies, is sufficiently answered by

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privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision . . . .

the breadth of the language. The understanding that the words mean all they say was illustrated by President Roosevelt's freezing the assets of nationals of Norway and Denmark on the invasion of those countries by Germany long before the United States was at war . . . . We take the prompt Congressional ratification . . . as a demonstration of approval of what was already lawful rather than as an indication of doubt."

Acting under the authority of the Trading with the Enemy Act and the declared state of national emergency, the Secretary of the Treasury, to whom the President delegated his rule-making power under the Act, promulgated the Foreign Assets Control Regulations, 31 C. F. R. Part 500 (1968). The relevant portions of those regulations are set forth in the margin.[5]

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[5] §500.201 Transaction involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

. . .

(3) The exportation or withdrawal from the United States of gold or sliver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by

II.

Plaintiffs challenge the constitutionality of the Trading with the Enemy Act, contending that the Congress has delegated legislative power to the President without fixing standards. And they assert that the powers delegated to the President (if constitutionally delegated to him) are

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him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

. . .

(d) The term "designated foreign country" means a foreign country in the following schedule . . . :

SCHEDULE
COUNTRY AND EFFECTIVE DATE

1. China: December 17, 1950.
2. North Korea . . . : December 17, 1950.
3. North Viet-Nam . . . : May 5, 1964.

§500.204 Importation of and dealings in certain merchandise.

(a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam . . . .

§500.204 Appendix.

(108) *Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in main-

personal to his office and may not constitutionally be delegated to the Secretary of the Treasury or the Director of Foreign Assets Control. These precise contentions were raised and dismissed in *Sardino* v. *Federal Reserve Bank, supra.* Far from overruling *Sardino,* as plaintiffs urge us to do, we reaffirm it as a sound and well-reasoned decision.

Plaintiffs contend that even if *Sardino* is reaffirmed a different set of standards should apply to the present case because the challenges on the basis of overbroad delegations of power involve first amendment claims. Our conclusion that plaintiffs' first amendment rights have not been violated makes it unnecessary to decide that issue.

Sardino also provides a sufficient answer to plaintiffs' contention that the statute and the regulations deprive them of property without due process of law.

III.

Plaintiffs' major contention is that the statute and regulations violate the first amendment. They argue both that it is unconstitutional to subject the exercise of first amend-

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land China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations.

ment rights—the receipt of publications—to "burdensome and time-consuming administrative procedures," and that the regulations require the keeping of records that impair the applicants' right to anonymity.

The challenged regulations were designed to limit the flow of currency to specified hostile nations: mainland China, North Korea, and North Vietnam. We are presently in a state of armed conflict with North Vietnam; and while we are not at war with either China or North Korea our relations with those nations are hardly peaceful. As we noted in *Sardino,* "Hard currency is a weapon in the struggle between the free and the communist worlds." 361 F. 2d at 112. The regulations contribute to the furtherance of a vital interest of the government.

It is true that the regulations result in some limitation on the availability of publications and films originating in China, North Korea, and North Vietnam. To the extent of this limitation the regulations impinge on first amendment freedoms. However, restricting the flow of information or ideas is not the purpose of the regulations. The restriction of first amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations. Moreover there is no censorship of selected materials; all publications from the specified nations are treated alike. 31 C. F. R. §500.204 App. ¶108 (1968).

The challenged regulations themselves provide for the availability of the foreign publications. They can be, and are, admitted if the payments for them are made into blocked accounts or if the publications are sent as gifts. *Id.* And the publications are available at "universities, libraries, [and] research and scientific institutions," 31

C. F. R. §500.204 App. ¶108 (1968), which are allowed to import them without restriction as to payments.[6]

The Supreme Court has recently said:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 376-77 (1968) (footnotes omitted).

Applying the Supreme Court's test here we conclude that the infringement of first amendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations.

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[6] The existence of an exception that allows a small sum of money to flow to the hostile nations in order to protect first amendment freedoms by making the foreign publications available to those institutions that can give the publications the broadest exposure to the public and that can make the greatest use of them for purposes of study, does not justify an attack on the basic regulation.

Plaintiffs point to the lengthy delays involved in processing the license applications of Teague and Polin and argue that *Freedman* v. *Maryland,* 380 U. S. 51 (1965), requires the invalidation on constitutional grounds of such a time-consuming procedure. The government indicated, however, that the delays in processing the Teague and Polin applications were attributable to this lawsuit, because the Treasury Department was forced to coordinate its activities with the Justice Department. The district court found that a license application can typically be processed within 10 days. In any event, we do not consider *Freedman* v. *Maryland* controlling in a situation such as this. *Freedman* was concerned with the length of time required to adjudicate whether a film was obscene in light of the presumption of unconstitutionality borne by any system of prior restraints of expression, see 380 U. S. at 57, and cases cited. Here, by contrast, there is no inquiry into the content of detained material. The only delay is that required to determine that money is not being sent to one of the designated nations; there is no design to limit the free flow of ideas.

Lamont v. *Postmaster General,* 381 U. S. 301 (1965), is not apposite. As Mr. Justice Brennan noted in his concurring opinion in *Lamont, id.* at 309, the solicitor general expressly conceded that no compelling governmental interest required enactment of the statute there called in question. The only purpose of the statute was to protect the sensibilities of recipients of Communist political propaganda who might be offended by getting publications espousing unpopular ideas. Here the government's purpose is obviously enormously more important and substantial.

Finally, plaintiffs contend that the licensing procedure violates their fifth amendment right against self-incrimina-

tion. They rely on *Haynes* v. *United States*, 390 U. S. 85 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Marchetti* v. *United States*, 390 U. S. 39 (1968). We find those cases, and *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70 (1965), to be inapplicable. By answering the questions posed on the required forms in those cases petitioners could have found themselves subjected to criminal prosecution. The information to be supplied by these plaintiffs on the forms required here would have no tendency to incriminate them.

The judgments of the district court are affirmed.

Opinions of the District Court

OPINION AND ORDER OF TYLER, J., GRANTING SUMMARY JUDGMENT TO DEFENDANTS

TYLER, *D.J.*:

Plaintiffs are two individuals and four groups. They have all been sent and wish to receive mail shipments of certain publications originating from and published in North Vietnam and mainland China. At least since November 1966, the defendants have detained the shipments because the Foreign Assets Control Regulations, 31 C.F.R. § 500.204, issued pursuant to the Trading with the Enemy Act, § 5(b)(1), 50 U.S.C. App. § 5(b)(1) prohibit the importation of any merchandise, the country of origin of which is China (except Formosa) (hereinafter "Red China") or North Vietnam other than as authorized.[1]

There is a specific exception to this general prohibition to permit the importation of publications. On May 30, 1967, after the commencement of this action, the provision dealing with the importation of publications was amended to provide the following:

> "(108) Publications and films from China, North Korea and North Vietnam. Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films orginating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to method of payment under programs ap-

[1] "Except as specifically authorized . . . by means of regulations, . . . no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam." 31 C.F.R. § 500.204.

proved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations." 32 Fed. Reg. 7829-7830 (1967), amending 31 C.F.R. § 500.204 appendix § (108).[2]

Contending that the requirement that they obtain a license violates their First Amendment rights, plaintiffs, with the exception of Charlotte Polin, have refused to make the necessary applications to receive the publications. Because she needed the literature for her work, Charlotte Polin reluctantly applied for and obtained a license. She, however, alleges that the administrative delay in connection therewith constituted an infringement of her First Amendment rights. In addition, plaintiffs Walter Teague III and United States Committee to Aid the National Libera-

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[2] Until amended, section (108) read as follows:

"(108) Publications from China, North Korea and North Viet-Nam. Publications imported directly from mainland China, North Korea or North Viet-Nam may be licensed for commercial importation provided all payments due to the Chinese, Korean or Viet-Namese suppliers are made into blocked accounts. Publications from mainland China, North Korea and North Viet-Nam may also be licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications may also be licensed in exchange for publications from the United States."

tion Front of South Vietnam ("Aid Committee") allege that the regulation which prevents their making direct payments to the suppliers or publishers of the literature is an abridgement of their First Amendment rights.

On December 30, 1966 plaintiffs filed a complaint requesting certain declaratory and injuncive relief. Specifically they have asked that the statutes and regulations thereunder be declared unconstitutional, that they be allowed to receive any printed material containing factual information or political opinion without first applying for or obtaining a license, and that Aid Committee be permitted to pay the publishers for whatever material might be sent. In addition, they have requested that the Regional Commissioner of Customs and the Secretary of the Treasury be enjoined from enforcing the statute and regulations in any manner which would restrict the importation of printed material, regardless of the country of origin.

Plaintiffs have now moved for summary judgment. In the alternative, they pray that a temporary injunction be issued and a statutory three-judge court be convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear and determine all the issues. The defendants have cross moved for summary judgment on the merits and, in addition, ask that the complaint be dismissed for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).[3]

I.

Plaintiffs in their original complaint alleged only federal question jurisdiction. 28 U.S.C. § 1331. Defendants in their original answer denied jurisdiction under section 1331

[3] There is an additional motion by plaintiffs pursuant to rule 30(b), F.R.Civ.P. to vacate defendant's five notices to take plaintiffs' depositions. In view of the disposition of the other motions, it is unnecessary to pass on the issues raised by this application.

in that the amount incontroversy did not exceed $10,000, pointing out that the estimated value of the detained publications was and is only $2060.

Subsequent to the argument of their motion for summary judgment, plaintiffs moved to amend their complaint to state two additional bases of jurisdiction under 28 U.S.C. §§ 1337 and 1356. The defendants, without conceding the sufficiency of these allegations, did not oppose the motion to amend, which is granted. Consequently, the threshold question of whether there is jurisdiction will be resolved on the basis of the amended complaint.

Section 1337 gives the district courts original jurisdiction of actions arising under an act of Congress regulating commerce, regardless of the amount in controversy. Since this action calls into question the validity, enforcement or construction of such a statute, I assume that there is jurisdiction pursuant to section 1337. See *Mulford* v. *Smith*, 307 U.S. 38 (1939).

II.

The application to convene a three-judge court must be denied. Section 5(b) of the Trading with the Enemy Act was recently upheld against a similar attack by the Court of Appeals for this circuit. *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966). In *Sardino*, the appellate court considered whether the district court should have convened a three-judge court and concluded that because the substantial constitution attack was not upon the Trading with the Enemy Act but upon the Cuban Assets Control Regulations, no three-judge court was required. *Id.* at 113-116.

Apparently mindful of *Sardino*, plaintiffs here argue that there are essentially three constitutional infirmities in the statute: (1) it represents an unconstitutional delegation of legislative power to the president; (2) it is an uncon-

stitutional delegation of presidential power to a minor official; and (3) it is unconstitutionally broad in that it provides no standards for reviewing the determination that an "emergency" exists.

These arguments are practically identical to those raised in *Sardino*. In addition to upholding the statute, that case held that the constitutional attack on the Trading with the Enemy Act was so insubstantial as not to warrant the convening of a three-judge court.

As in *Sardino*, the only potentially substantial argument raised by these plaintiffs is directed at the regulation, here 31 C.F.R. § 500.204 appendix § (108), which requires that they furnish certain information and obtain a license before they will be allowed to receive the publications. As such, it is not an attack against the statute. In the event that the regulation were deemed unconstitutional, the court would be bound to interpret the legislative mandate as not authorizing the regulation, leaving the Act of Congress untouched. *Sardino*, at 115.

Accordingly, the application to convene a three-judge court must be denied. See also *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939).

III.

As indicated heretofore, the only substantial question presented in this action is whether it is an unreasonable intrusion on First Amendment rights to condition receipt of these publications upon a showing that the publications are bona fide gifts or, if not, that any payments have been made only as specifically authorized by the regulations.

The obvious purpose of the pertinent regulation is to prohibit the countries of North Korea, North Vietnam and Red China from deriving any economic benefit whatsoever

from any transactions which they or their nationals might have with persons subject to the jurisdiction of the United States. In the present posture of United States diplomatic relations—or lack thereof—with these countries, the reasons for the policy are obvious and merit no extended discussion. In fact, plaintiffs do not appear to question the underlying policy, arguing only that when, as here, it is applied to the importation of publications from these countries, it is an unconstitutional infringement of First Amendment rights.[4]

Plaintiffs rely on the case of *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) in which a statute requiring the Postmaster General to detain and to deliver only upon the addressee's request unsealed foreign mailings determined to be "communist political propaganda" was declared unconstitutional.

Lamont, however, involved a different statute, a substantial effect of which to inhibit, or at least make more difficult, the exercise of First Amendment rights. As such, it presented a plainer constitutional problem.

Here, the pertinent statute is obviously directed at vindication of a compelling national interest. Specifically, of course, the statute is aimed at avoiding aid and comfort to non-friendly governments by shutting off the unrestricted flow of American dollars in return for merchandise shipped from such countries. Surely the constitution commands few higher obligations of the executive and the legislature than those of waging war and conducting our relations with foreign powers. During this period of undeclared but nevertheless very real wars involving this nation, the Trading with the Enemy Act is a diplomatic weapon, the importance of which cannot be gainsaid.

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[4] There can be no question but that the regulation applies to the importation of publications. Plaintiffs' suggestion that it does not so apply is based on their counsel's analysis of the wrong regulation, 31 C.F.R. § 500.201.

It is relevant in the context of this case to note that the regulation which provides for the licensing of publications from Red China and North Vietnam is an exception to the general command that no merchandise be imported from either country. It is a regulation drawn with care to achieve a realistic and desirable balance between the needs of our foreign policy as summarized above and the rights of individuals trying to enjoy First Amendment freedoms.

Section (108) place no restrictions on the kinds of publications which may be imported. It states with reasonable precision that publications such as these which originate in Red China or North Vietnam will be licensed upon a showing that neither these countries nor their nationals have derived any benefit from the transactions. The only burdens upon the plaintiffs are the minimal ones of providing the required information and waiting approximately ten days for the application to be processed.[5]

I am aware of the admonition in *Lamont* that, "In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Lamont,* at 310 (concurring opinion of Mr. Justice Brennan). But this is precisely the kind of regulation which plaintiffs attacks, and any inconvenience to plaintiffs as here alleged is outweighed by the national interest in restricting the flow of dollars to North Vietnam and Red China.

Summary judgment dismissing the complaint is granted to the defendants. All other motions not heretofore specifically disposed of are denied. It is so ordered.

Dated: New York, N. Y.,
August 4, 1967.

H. R. Tyler, Jr.,
U. S. D. J.

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[5] The somewhat longer delay in the case of Charlotte Polin was apparenty due to the pendency of this litigation as well as to her own tardiness in supplying the required information.

OPINION AND ORDER OF MANSFIELD, J., DENYING MOTION TO VACATE JUDGMENT

MANSFIELD, *D.J.*:

Plaintiff moves, pursuant to Rule 60(b)(2), F.R.C.P., to vacate this Court's order of August 7, 1967, which granted summary judgment dismissing plaintiffs' declaratory judgment action, on the ground of newly discovered evidence.

The complaint alleges that in November and December, 1966, the Regional Commissioner of Customs, acting pursuant to the Trading With the Enemy Act, 50 U.S.C. App. § 5(b)(1) and the Foreign Assets Control Regulations, 31 C.F.R. § 500.204, *et seq.*, detained packages of printed matter published in North Vietnam mailed to plaintiffs at their request. In each case, the Commisioner notified plaintiff of his intention and advised them that it was necessary to obtain licenses * from Foreign Assets Control in order to obtain the literature.

On December 30, 1966, plaintiffs, without applying for licenses, brought the declaratory judgment action to prevent enforcement of the relevant legislation and the regula-

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* 31 C.F.R. § 500.204(108), as amended on May 30, 1967, provides:

> "*Publications and films from China, North Korea and North Vietnam.* Publications and films originating in mainland China, North Korea or North Vietnam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. . . . Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to the designated countries or nationals thereof from the importations." 32 Fed. Reg. 7829-7830 (1967), amending 31 C.F.R. § 500.204 (108).

tions thereunder on the ground that they offended plaintiffs' First Amendment rights to receive political literature. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). Thereafter, plaintiff Charlotte Polin, on January 23, 1967, applied for a license. On February 20, 1967, Foreign Assets Control requested proof that the publications imported by her were bona fide gifts, and thereafter she was granted a license.

On August 7, 1967, the complaint was dismissed by Judge Tyler on the ground that, in view of the compelling national interest in isolating North Vietnam economically, a licensing procedure that would prevent individuals from receiving literature emanating from North Vietnam for which they were required to provide financial or commercial benefit to that country could be established without infringing First Amendment safeguards. See *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *United States* v. *Harriss*, 347 U.S. 612 (1954); Casenote, 79 Harv. L. Rev. 154 (1965). Plaintiff has appealed this decision to the Court of Appeals, where it is now pending. In the course of his opinion, Judge Tyler, while pointing out that in the normal course of events the only burdens imposed upon license applicants would be those of furnishing the necessary information and waiting ten days for the application to be processed, explicitly sanctioned the licensing procedure as it applied to Charlotte Polin on the ground that it was "apparently due to the pendency of this litigation as well as to her own tardiness in supplying the required information." 66 Civ. 4543, p. 14 n. 5.

On August 17, 1967, plaintiff Teague, in his personal capacity and on behalf of the United States Committee to Aid the National Liberation Front in South Vietnam, applied for a license to obtain the literature which was the subject of his declaratory judgment action, stating that

"the amount of the transaction is $00.00 as no monies are involved." On September 29, 1967, the Director of Foreign Assets Control, through its agent, the Federal Reserve Bank of New York, sent Teague a questionnaire seeking more detailed information regarding the transaction, together with information as to prior remittances that were sent to North Vietnam, informing him that "unless response to this inquiry is received within 30 days after date hereof, the application will be considered as having been withdrawn and our records will be marked accordingly." Thereupon, with the case on appeal, Teague brought his present motion to vacate the prior judgment on the ground that the administrative procedure that he had to face in order to obtain his license was substantially greater than that contemplated in Judge Tyler's decision. In his motion papers Teague asserts that the additional burden imposed is sufficient to show that the licensing procedure is a most effective device to discourage citizens from receiving publications which are undeniably protected by the First Amendment.

A judgment will be vacated as a result of newly discovered evidence only if the evidence offered is more than cumulative, *Kolan* v. *Csengeri*, 268 F.2d 239 (2d Cir. 1959) (per curiam); *Thomas* v. *Nuss*, 353 F.2d 257 (6th Cir. 1965), and of a nature such as to indicate that a different result would be probable. *Thomas* v. *Nuss, supra; Philippine National Bank* v. *Kennedy*, 295 F.2d 544 (D.C.Cir. 1961); *Baruch* v. *Beech Aircraft Corp.*, 172 F.2d 445 (10th Cir. 1949). In this case, Foreign Assets Control applied very much the same procedure to Teague as it had applied to Charlotte Polin. Since that procedure, as applied in the case of her application, was considered by Judge Tyler, and is part of the record now on appeal before the Court of Appeals, there is no justification for granting relief.

Plaintiffs, pursuant to Rule 30(b), F.R.C.P., have also moved to vacate defendants' notice to take depositions. Judge Tyler held that his disposition rendered moot plaintiffs' prior motion to vacate defendants' deposition notices. A like result is appropriate on plaintiffs' present motion. See *Williams* v. *New Jersey–New York Transit Co.*, 1 F.R.D. 138 (S.D.N.Y. 1940).

The motion is denied.
So Ordered.

Walter R. Mansfield,
U. S. D. J.

Dated: January 9, 1968.

APPENDIX B

Judgments Sought to Be Reviewed

JUDGMENT AFFIRMING JUDGMENT OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

WALTER TEAGUE, III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Plaintiffs-Appellants,

—v.—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

JUDGMENT AFFIRMING ORDER DENYING MOTION TO VACATE JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

WALTER TEAGUE, III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

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ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statute and Regulations

50 U. S. C. App. §5(b), in pertinent part, provides:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> • • • • •
>
> Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be

fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *.

The pertinent provisions of the Foreign Assets Control Regulations, 31 C. F. R. Part 500. are:

§500.201 *Transactions involving designated foreign countries or their nationals; effective date.* (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or

securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term "designated foreign country" means

• • • [China, North Korea and North Viet-Nam.]

§500.204. (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise,

no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is: (1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam. * * *

§500.204. Appendix.

(108) *Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China. North Korea, and North Viet Nam are also licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefits to designated countries or nationals thereof from the importations.

§500.503. The Secretary of the Treasury reserves the right to exclude from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof. Such

action shall be binding upon all persons receiving actual notice or constructive notice thereof.

§500.801. (a) * * *

(b) *Specific licenses*—(1) *General course of procedure.* Transactions subject to the prohibitions contained in Subpart B of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of Foreign Assets Control are performed by the central organization and the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of Foreign Assets Control or such person as he may designate.

(2) *Applications for specific licenses.* Applications for specific licenses to engage in any transaction prohibited by or pursuant to this chapter are to be filed in duplicate on Form TFAC-1 with the Federal Reserve Bank of New York. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing the effecting of such transaction, and there is no requirement that any other person having an interest in such transactions shall or should join in making or filing such application.

(3) *Information to be supplied.* Applicants must supply all information specified by the respective forms and instructions. Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with Foreign Assets Control may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed neces-

sary to a proper determination by the Control. If an applicant or other party in interest desires to present additional information or discuss or argue the application, he may do so at any time before or after decision. Arrangements for oral presentation should be made with the Control.

(4) *Effect of denial.* The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) *Reports under specific licenses.* As a condition upon the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.

(6) *Issuance of license.* Licenses will be issued by Foreign Assets Control acting on behalf of the Secretary of the Treasury or by the Federal Reserve Bank of New York, acting in accordance with such regulations, rulings and instructions as the Secretary of the Treasury or Foreign Assets Control may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury or Foreign Assets Control may determine, or licenses may be issued by the Secretary of the Treasury acting directly or through any person, agency, or instrumentality designated by him.